1891

The Construction of a Condition Precedent

George H. Emerson
Cornell Law School

T H E S I S

--o--

The Construction

of

a Condition Precedent

--o--

George Hale Emerson

---o---

Cornell University

1891.

Introduction.

It seems but fitting that the student should specialize in the treatment of those phases of law which he may have chosen to render. His learning and experience are not sufficiently broad nor deep enough in all particulars to permit him to generalize in his work with that accuracy which would characterize as valuable the ultimate result of this his thought and labor. The author of this thesis has therefore narrowed down the scope of his investigations and feels for this reason perhaps less hesitation in submitting these pages to more general criticism. The reader will find but little that is new or original, the propositions of law as stated are old, well established, and sound. May their present arrangement prove useful.

TERMINOLOGY and DEFINITIONS.

It is at best difficult to generalize with precision in a few words the entire scope and effect of a legal term, and in the present case this difficulty is materially enhanced by reason of the many erroneous meanings in which the term 'condition' has been used, Of Latin origin, imported into our own tongue through the Norman French the word "condition" has not less than nine distinctly different meanings in the English language, irrespective of the sense given to it in the law.* When to this nice complexity, we can further add, that in law "condition" and "warranty" have been used interchangeably with any but logical discrimination, the task becomes difficult indeed to obtain by a careful perusal of cases and text books a clear and adequate idea of the correct meaning, use and effect of the word "condition" per se.. An illustration of this provoking confusion of terminology is afforded us in the case of Behn v. Burness* " But with respect to statements in a contract descriptive of the subject matter of it, or of some material incident thereof, the true doctrine established by principle,

* Cent. Dictionary.
* 1. B.&.S. 877. 3. B.&.S. 751.

as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say a condition on the failure or non performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If indeed he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz. a stipulation by way of agreement, for the breach of which a compensation must be sought in damages." Aside from all question of law involved, the above case shows the prevalent confusion existing among earlier decisions. It becomes advisable at this time to state in a general way the legal effect of a condition or warranty in a contract in order to appreciate and therefore to avoid the erroneous usages adopted by the substitution of 'warranty' in the stead of 'condition'.

When a term in the contract is ascertained to be a condition, then whether it be a statement or a promise, the untruth, or the breach of it will entitle the party to whom it is made to be discharged from his liabilities under the contract.* A warranty is an independant promise the breach of which does not discharge the contract but gives to the injured party a right of action for such damage as he has sustained by the failure of the other to fulfill his promise*

Such being the substance of the law we have in this manner obtained a guide to discover any misapplication of either term. For instance, in a case of assumpsit on an alleged warranty by the defendant, upon a sale of indigo by him to the plaintiffs, the indigo turned out to be composed of worthless matter prepared so as to deceive the most skillful dealers but no fraud or unfair conduct was imputable to the defendant.** Wilde,J says "We do hold, that the description in a bill of parcels imports a warranty. It is a representation and declaration that the article sold is the articles described. And what is this but an express warranty to that effect. If the vendor, at the time of sale, affirms a fact, as to the es-

* Anson on Contracts p. 142.
** Henshaw v Robbins 9. Met. 83.

sential qualities of his goods, in clear and definite language, and the purchaser buys on the faith of such affirmation, that we think is an express warranty. We are therefore of opinion that the plaintiff is well entitled to judgement. Indeed he would be entitled to recover by the law as it is held in New York, for according to all the authorities, he had a right to rescind the contract and, as he has returned the article purchased he might recover in this action, on the count for money had received, if there had been no warranty." Another example.

"Independently of the judicature act it is settled * that where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may persue. 1st. He may refuse to receive the article at all, the power to pursue this first course, however, not extending to cases where there has been a warranty upon the sale of a specific chattel, and where, the property passing by the contract, it is not competent to the vendee to rescind it ** without the consent of the vendor, or a stipulation.ii ..... ***etc.*** " However ambiguous the true meaning of the above statement of law is, its author does maintain that under some circumstances

*by Sheep v Blay 2 B.+Ad 456 and Poulton v Lattimore 9 B.&.C. 259
** See observation of judges in cases Dawson v Collis. 10 C.B. 523 also Parson v Sexton 4 C.B. 899.
*** Smith's Leading Cases Vol. II p.29.

upon the breach of a warranty, a contract may be rescinded, and from the very exception he makes in favor of the only warranty known to our law (excepting in cases of insurance) we must infer that he has here used the word 'warranty' where under our present legal terminology we would have said "condition".*

In Hamerman v White* Erle, C.J. says: "We avoid the term warranty because it is used in two senses" and in Anson on Contracts ** the author remarks; "It will be observed that warranty is here used in several senses. It is first made a convertible term with a condition; it is then used in the narrower sense of the word."

In the law of insurance warranty is still used in the meaning of condition, such use having become established by a long series of decisions. The confusion of terms does not end here, for we find in Whalton v Hardisty*** Channel, B. telling us" some confusion appears to me to have been introduced, during the argument, in the use of the word warranty, the breach of warranty does not avoid the contract, unless the warranty amounts to a condition. Now even assuming the statement here to amount to a warranty, it is a warran-

* 10 C.B.N.S. 30
** p. 142
*** 8 E & B. 302.

ty is the nature of a condition."

From these few examples we have endeavored to give some idea of the confusion extant in earlier cases, and the constant use of the word warranty will excuse us in giving a full definition of a warranty, we hope by this negative analysis in explaining conditions precedent to avoid at least one stumbling block constantly met with in the older authorities.

A warranty properly so called can only exist where the subject matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract, and it is a collateral engagement that the specific thing so sold possessess certain qualities, but the property passing by the contract of sale.* A breach of warranty cannot entitle the vendee to rescind the contract, and revest the property in the vendor, without his consent, the vendee must therefore resort to an action for such breach or give it in evidence in reduction of the price or as an answer to the action if the breach renders the articles wholly worthless. **.

We now approach a more important question. What is a condition? What is a condition precedent? The definitions of "condition" are in general de-

* Dixon v Yates 5 BxAd. 313. Gilmore v Supple 11 Moo P.C.D. 551.

** Smiths Leading Cases Vol II p 31

fective. The one found in Anderson's Law Dictionary is as simple as it is limited. "Condition is a quality annexed to a personal contract or agreement. Condition precedent, such a condition as must happen or be performed before the estate can vest or be enlarged". The statement made by Mr.Anson* is not acceptable as a definition. It defines nothing at all, and is merely a narrative of the effects attaching to such term of a contract which has already been declared to be a condition. The statement is further limited to such conditions only which are a term of the contract, and does not seem to include conditions implied by the law not directly constituting terms of the contract. As definition the statement is patently defective in two particulars. The same criticism applies to the remarks of Pollock in his Principles of Contract.** But in justice to both these authors we must say the subject of condition is there incidentally adverted to to elucidate fraud and misrepresentation and their remarks cannot be taken as intended to confine the term condition to such limited interpretation. The most comprehensive definition we have found is the following. "Condition in law . A statement that a thing is or shall be which constitutes the essential basis or an

* see ante p- 4
** p.(463 p (465.

essential part of the basis of a contract or grant; a future and uncertain act or event not belonging to the very nature of the transaction, on the performance or happening of which the legal consequences of the transactions are made to depend. More specifically, a condition is a provision on the fulfilment of which depends the taking effect or continuance in effect of the instrument or some clause of it, or the existence of some right established or recognized by it, as distinguished from a covenant, which is a promise in a sealed instrument the breach of which may give rise to a claim for damages, but not necessarily the forfeiture of any right. The performance of a covenant, however, may be made a condition of the continued efficacy of the agreement. A condition precedent is a provision which must be fulfilled or an event which must be fulfilled before the instrument or clause affected by it can take effect. A condition subsequent contemplates that, after the instrument has taken effect, a right established or recognized by it may be extinguished by some future or uncertain event".*

These definitions, however, are either incorrect or limited and unsatisfactory. Not one of them is strictly speaking a definition, which should consist in

* Century Dictionary.

fixing by language the precise signification - the connotation- of general names. The singling out of one or two properties, for the mere purpose of discriminating is not a proper or perfect definition, the act of defining consists of a generalizing operation, rendered precise at every step by explicit or implicit opposition, negation or contrast.*

None of the definitions we have cited enable us to recognize among a complicated relation of circumstances, what is, or is not a condition precedent, nor do they tell us in any given case, where the intention of the party is not already definitely expressed, whether a condition precedent is or is not at the very foundation of the contract. It has therefore seemed most advisable to us to revert to the maxim of old logicians. Omnis intuitiva notitia est definitio, a view of the thing itself is its best definition.

The nature of an agreement cannot be characterized differently and better than upon those rules of logic and law which have become crystalized. However difficult it may at first seem to sort out a clear conception of a condition precedent in cases where the intention of the parties to that effect is not expressed definitely in the agreement, it will still be found that such agreements are presumed to be based on settled rules, having studied which

* A. Bain Logic Vol. II p.154.

rules we shall be better able to say what is a condition precedent.

Rule 1.

We place at the head of these rules one which logically controls all the others to a greater or lesser extent, and which being applicable to the construction of any and every contract cannot fail to govern in construing that portion of them only, termed condition precedent.

Our law does not at the present time, as it did the Roman Law in some instances, impose upon the parties to an agreement the duty to express their agreement in any settled form of words recognized by usage, or sanctioned by the courts; the parties to a contract are left to express in language of their own choosing, a contract of their own making, heedless of all precedents, taking in consideration solely the particular circumstances which have prompted them to contract. The contract once made, is the result of their mutual consent and agreement, the immediate outgrowth of a common intention of the parties to it. The law having but to a limited extent checked this choice of form for the purpose of contracting*, it follows as a fundamental principle relating to all agreements, that the first rule of interpretation must be, that the intention of the parties is to govern in all

* Statute of Frauds, Deeds etc.

cases where not unlawful, after giving to the words used their appropriate common or technical meaning and their grammatical construction.

I have already intimated that the interpretation of a condition precedent comes within this rule of construction. It is open to the parties to add to the ordinary description of the thing contracted for any other term they please so as to make that an essential part of the contract, a term so added is a condition,* and whether the representation is made in writing instead of words it is plain that its nature is not thereby altered, and in either case a question may arise whether the statement be not something more than a mere representation, whether it be not part of the contract. On a written instrument this is a question of construction, one of law for the court, not one of fact for the jury. Whenever it is determined that a statement is really a substantial part of the contract there comes the nice and difficult question. Is it a condition precedent? or is it an independant agreement? a breach of which will not justify a repudiation of the contract, but only a cross action for damages?**

The parties are certainly competent to contract in independent covenants, or

* Pollock's Principles of Contract p.483
**Benjamin on Sales p.514.

to make their covenants dependent, the performance of one conditional upon that of the other and whatever their intention, it is the first rule to carry that intention into effect. The rule was laid down by Lord Mansfield in 1781 in Jones v Barkley *, that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and the decision of the question, said Chief Justice Tindall in Glanola v Hays,** must depend upon the intention of the parties, to be collected in each particular case, from the terms of the agreement itself and from the subject matter to which it relates. Applying this rule of construction, it is now an easy matter to determine all conditions precedent which are clearly expressed to be such in the written agreement itself, and beyond a mere recognition as a term of the contract their interpretation offers no further difficulty. But it is a matter of precise and nice distinction to recognize when a statement in the contract must by reason of an implied intention of the parties be considered as a condition precedent. The law upon this subject is confusing and the reasoning upon which both text writers and judges base their opinions is in many instances illogical and erroneous. The form of all contracts is necessarily limit-

* 2 Doug. 684; 691.
** 2 Man & G. 257, 263.

to one among three classes, they are either written agreements, or parol. agreements or agreements partly in writing and partly parol. It is obvious that the very existence of a contract may be subject to a condition precedent. Where, for instance, the parties agree, that in case of a declaration of war between two countries the executive contract they have entered into shall become null and void, the life of this contract depends upon the condition precedent, which forms a substantial part of the whole transaction. Evidence is admissible to show that the professed contract is in truth what it professes to be, and, as in the instance above, that it is subject to some parol condition upon which its existence as a contract depends.*

We turn now to the explanation of these principles found in cases and text books, always bearing in mind the Statute of Frauds and similar enactments.

It was said by Crompton,J. in Pym. v Campbell **"if the parties have come to an agreement, though subject to a condition not shown in the agreement, they could not show the ~~agreement~~ condition, because the agreement on the face of the writing would have been absolute, and could not be varied; but the finding of the jury is that this paper was signed on the terms that it was to be an agreement if approved of the invention, not otherwise.

*Anson on Contracts 239; Pollock's Principle of Contracts 439; Addison on Contracts §247.

** 6 E & B 373.

I know of no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else done."

While we recognize that the above decision is certainly good law we cannot help but criticize the principle upon which it is based. It would seem to us that whenever a written agreement is subject to an oral condition precedent, the condition and the written agreement together form but one contract. There is no rule of law pronibiting a contract from being part written and part oral, in thet absence of a special legal provision that the contract must be in writing.* The statement of Judge Crompton is therefore based upon a misunderstanding of the true relation of the oral condition, to the written contract. The two together form but one contract part oral, part in writing; the covenants are dependent and it is perfectly competent to prove an oral contract by oral testimony tho' it modify the written portion. To say that the oral testimony is admissible in this instance in order to show that the written half of the agreement is not a contract in fact,

* Anson p.240.
Addison p.43.

is erroneous. There is practically no difference between a written agreement subject to an oral condition precedent and one where the condition proper is contained in the words of the contract. A clear distinction must be made however between mere representations between the parties trivial in character and such representation which by reason of their very materiality were intended to be made the basis, and their truth or fulfilment a condition precedent of the contract, or again those stipulations though trivial in nature which by express agreement either oral or otherwise have actually been made a substantial part of the contract. We avoid the use of the expression "term of contract" because by reason of its ambiguity it may designate either a written portion of the agreement or a part of the entire contract. Mr Anson has fallen into this ambiguity rendering the result of his investigation more or less vague. He tells us on page 140" that conditions are either statements , or promises which form the basis of the contract. Whether or not a term in the contract amounts to a condition must be a question of construction to be answered by ascertaining the intention of the parties from the wording of the contract and the circumstances under which it was made. ."

and on the next page he says "Representation made anterior to contract; held a condition." This statement is erroneous and is not founded upon any principle of sound reasoning . The very case cited to support the doctrine, goes to show that the representations were considered as a part of the contract, so essential in fact that they formed the basis of the entire agreement, and we cannot understand how representations which evidently were considered to form the most essential part of the contract can be anterior to themselves, that is to say the entire contract, as Mr. Anson would have us believe.

We have in the case of Bannerman v White* a good illustration which clearly demonstrates the untenable reasoning of J.Crompton previously adverted to. Before commencing to deal for hops the defendant asked the plaintiff if any sulphur had been used in the treatment of that years growth of hops. The plaintiff said "no". The defendant said that he would not even ask the price if any sulphur had been used in the treatment of the hops. After this the parties discussed the price and the defendant agreed to purchase the growth of that year. He afterwards repudiated the contract on the ground that sulphur had been used by the plaintiff in the treatment, It does not appear from

* 10 C.B.N.S. 80.

the case that the later part of the negotiation was in writing. Granting that it was in writing it was certainly competent for defendant to show the entire agreement written and oral, not upon the basis that oral evidence is admissible to show that what upon its face is an agreement in reality is only conditionally one, but upon the reasoning, that here is an entire contract to be proved, wherein one part will be shown to be dependant upon the other and be thereby limited in its effect. Text writers* also place the introduction of evidence upon the same erroneous reason as J. Crompton.

Having rid ourselves of misconceptions it becomes important to notice what representations made orally will ultimately merge into the entire contract and assume the character of a condition precedent. Mr. Anson has so admirably stated this part of the law of contracts that nothing remains for further elucidation. In a general way it may be said that such representations must be material, and it remains for the circumstances of each case to give the adequate color to the statements embraced within its stipulations.

"The rules for determining what are and what are not conditions precedent are well established when they are made", says Williams in Christie v Borelly ** with the declared object of discovering the intention of the parties.

* Pollock's Principle of Contract 439; Anson on Contracts p.239 241 242 and see as to how oral contracts are proved p.238. ** 7.C.B.N.S. 530.

They are not inflexible or to be applied where from the nature of the agreement the application of them would frustrate the intention of the parties. "Every lawful provision or condition in the contract of parties should control and should not be disregarded in the determination of their rights if it can be deemed to have entered into the contract with any definite or perceptible purpose in interpreting their agreements and in determining the respective obligations based upon their writings, courts should look at the surrounding circumstances, the situation and relation of the parties, and the subject matter of their negotiations. In that way the intention, where there is any uncertainty, is better given effect, and their undertaking is more certain to receive a reasonable and fair interpretation. But when the agreement is determined into which the parties have entered it is but just and fair that they should be held strictly to it, and all their stipulation we should assume to have been made for a purpose and to have been considered important by them and therefore cannot be dispensed with. Whether a provision shall have the effect of a condition absolute in its nature, is often a question of much difficulty. It should be obvious from a reading of the writ-

ings of the parties that it was the understanding of the parties it should have that effect. I do not think it depends upon the arrangement of the words in the writing but on the reason and sense of the thing as it can be collected from whatever constitutes the agreement sought to be enforced. That which is a condition must be some provision which cannot be severed from the agreement and leave it within a fair interpretation, as their contract.*

We have dwelt with some length upon the first rule as the following rules are only an elaboration of that first principle, how to discover the intention of the parties.

* Bank of Montreal v Recknagel 109 N.Y. 482. see also Barruso v Madan 2 Johns 145;: Selden v Pringle 17 Barb.158.
Parmelee v P.R.Co. 3 N.Y. 74.

We have so far discussed in general rather than specific manner those conditions precedent which are clearly expressed in the terms of the contract, be they parol or in writing. In the greatest number of cases , however, the question of conditions precedent arises in a different way, the specific conditions are not at all definitely expressed in the contract and it becomes necessary in order to give to the contract its true interpretation to determine whether the parties to it do not intend from the circumstances of the case as expressed in the agreement, or from the peculiar wording of the contract to imply certain conditions precedent. In a general way we can here say that the effects of a condition precedent upon the rights of the parties to the contract is a double one. In the first place they may consider themselves discharged from their obligations under the contract for any breach

of the conditions precedent it contained. Secondly there are some special contracts in which the promises upon the one side are dependant on the promises upon the other side, so that no action can be maintained for non-performance of the former, without showing that the plaintiff has performed, or at least has been ready. if allowed to perform the latter, the performance of or readiness to perform which is said to be a common precedent to his right of action*. Such a condition precedent going to the right of action of the parties is not always found to be clearly expressed in the terms of the contract. Covenants as we have endeavored to shew may be dependent or independent of one another. In obedience to our first general rule of construction, we have also seen, that the dependence or independence of such covenants is to be determined by the intention of the parties. To discover this intention the courts at an early date began to enunciate certain rules of construction, which have since become well established. These rules are not in the nature of positive law but are intended to enable us to determine the actual intent of the parties in any given agreement.

These rules will be found collated in the following pages.

* Smith's Leading Cases Cutler v Powell 2 T.R.p.9 ;Morton v Lamb 7 T.R.p.125.

Rule II.

The nature of the transactions and the order of time in which they are to be performed must be considered in determining what conditions are dependent and what are independent. This rule was laid down by Lord Mansfield in the case of Kingston v Preston.* His Lordship proceeded to say "that the dependence or independency was to be collected from the evident sense and meaning of the parties and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." The reason upon which this rule is based had already been pointed out by Lord Holt in a case decided in 1701** where he says: "Where one promises to do one thing for another, there is no reason he should be obliged to do it, till that thing for which he promised to do it, be done."

This rule of construction as above stated has never been abridged or altered. It is cited with approval in Northup v Northup*** where the defendent

* determined in E.15 Geo.3 cited in Jones v Barkley 2 Dougl p.689.
**Thorpe v Thorpe 12 Mod.460.
*** 6 Cowen 297.

had covenanted with the plaintiff to pay a certain amount of money to T. on a certain day , and the plaintiff covenanted that on the defendant so paying, he the plaintiff would give up and discharge a certain bond and mortgage." "The payment of the money to T." said Savage,C.J." on the day specified is clearly a condition precedent. The performance by the plaintiff of his part of the contract is not necessarily simultaneous but was naturally to be subsequent."

The case of Morris v Slater * arose upon the question whether an averment of performance in the declaration was necessary. The court Brownson,C.J. said; "where it appears from the terms of the agreement, or the nature of the case, that the things to be done were not intended to be concurrent acts, but the performance of one party was to precede that of the other, then he who is to do the first act may be sued although nothing has been done or offered by the other party. Now here, as I read the contract, nothing was to be done by the plaintiff until after the defendant should have completely performed his part of the agreement. The plaintiff was not to convey at the time of receiving the last payment; but within a reasonable time after that payment should be

* 1 Dem. p.60.

made. That might be a week or a month. I think the defendant has plainly agreed that he would pay the money and trust to a remedy on the plaintiffs covenant in case the deed should not be duly delivered and he must abide by his contract."

The authority of these cases has never been questioned and the rule must be deemed to be fully established in the State of New York.*

Rule XXI.

If a day is appointed for performing a stipulation on one part, and it is to happen or may happen before the stipulations on the other part are to be performed the stipulations are independent.

This rule is based upon much the same reasoning as the previous rule was, but is more definite and specific in its nature. It was first intimated by Hale, Ch.J. in Peeters v Opie** :"Although there are mutual promises in the case, yet the defendants promise was on the performance of the agreement, namely, that if the plaintiff performed the work, then the defendant was to pay him £8 for his labor, but otherwise not. But he said that if by the agreement it had been that the £8 should be paid on any certain day, perhaps the law

* Meriden Britannia Co. v Zingsen 48 N.Y. 247. see also Hotham v East India Co. 1.T.R. p.645 decided 1787. and Hopkins vYoung 11 Mass 302.

** 2 Saunders 350 23 Car 11.

would be otherwise because then it might be construed that the defendant relied on the plaintiffs mutual promise for his security."

The rule was laid down more definitely by Lord Holt in Thorpe v Thorpe* in 1701. "If there be a day set for the payment of money, or doing the thing which one promises to do for another, and that day happens to incur before the time the thing for which the promise is made is to be performed by the tenor of the agreement, then though the words be that the party shall pay the money, or do the thing for such a thing, or in consideration of such a thing, after the day is past the other shall have an action for the money, or other thing; although, the thing, for which the promise, agreement, or covenant was made, be not performed; for it would be repugnant then to make it a condition precedent; and therefore they are in that case left to mutual remedies, on which by express words of the agreement they have depended."

Serj. Williams incorporated this rule in his now celebrated notes to Pordage v Cole.** It received its widest Construction in the case of Terry v. Dunston.*** decided in 1795. The facts of the case were these.

A. covenanted to build a house for B. and to finish it on or before a cer-

* 12 Mod 455.
** 1 Saunders 320b
*** 2. H. Bl. 392

tain day in consideration of a sum of money which B. covenants to pay A. by instalments as the building shall proceed. The finishing the house is not a condition precedent to the paying the money, but the covenants are independent. A. therefore may maintain an action of debt against B. for the whole sum, though the building be not finished at the time appointed.

Says Buller,J. "The only question in this case is whether the covenants were dependent, and whether the completing the buildings was a condition precedent. Now it is a rule long established in the construction of covenants that if any money is to be paid before the thing is done, the covenants are mutual and independent. It is accordingly laid down by Lord Holt"etc. citing Thorpe v Thorpe. This decision was followed in the State of New York in the cases of Sears v. Fowler and Havens v Bush * but these two decisions were distinctly overruled in Cunningham v Morrell**. "Those cases" says Kent,Ch.J." were governed by the English decision in Jones v Bunter but from a more full consideration of the subject we are now led to believe that the court of C.B. carried too far the principle of mutual and independent covenants. It is true that if by the terms of the contract the money is to be paid by a day certain, and which

* 2 Johns. Rep. 272 and 387.
** 10 Johns 203.

is to happen before performance of the service, or by a day certain and there is no day certain for the performance, the performance is not a condition precedent and the party may sue for the money without averring or showing performance. We cannot think but the rule was misapplied, or carried to an unreasonable length in Terry v Buxton. The error in that case, and in the two cases in this court consisted in holding the covenants to be independent throughout, because a part of the consideration was to be paid on the completion of the service, and which rendered the service, pro tanto, a condition precedent There is nothing unreasonable or unusual in such an agreement. Having thus freed ourselves from undue embarrassment in considering the real merits of the case, we may say, that as the road was to be completed on or before the 20th of Oct. 1810 and as the defendant was to pay therefore the sum of $6000. to be paid on or before that day, in instalments as the work progressed, the just construction of the contract is, that if the plaintiffs will go for the whole consideration money they are bound to and show a performance of the whole work, and if they go for a ratable part of the money, they are bound to show a ratable performance."

As understood with these modifications this rule has remained established.*

* Selden v. Pringle 17 Barb 467.
1 Chitty Pleading 513 Ed of 1825.
Addison on Contracts §254.
Cutler v [redacted] 11 [redacted] 973.

Rule IV.

When a day is appointed for the payment of money etc. and the day is to happen after the thing which is the consideration of the money etc. is to be performed, no action can be maintained for the money etc. before performance.

Lord Holt laid it down in Thorpe v Thorpe * that if there be a day for the payment of the money or doing of other act for another; and that day is to be after the performance of the thing for which the promise etc. was made, then if the agreement be to pay the money, or to do other thing, (for) or (inconsideration) or such other words, then such things, for the doing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action. "

This rule has remained substantially as at first laid down, it was collated by Serj. Williams in his notes to Pordage v Cole** and became well established. The rule has been distinctly recognised in the courts of the State of New York and is well stated in Grant and Johnson *** and although the discussion of the judge turns for the most part upon the explanation of a different rule he still

* 12 Mod. 462.
** 1 Saunders 320
*** 5 N.Y . 247.

distinctly affirms the case to be within the letter and spirit of the present rule.* The same principle and case are cited with approval in Paine v Brown**.

* p.259.
** 37 N.Y. p.255 and for thorough exposition of this rule see cases cited in Smith's Leading Cases Vol.II p. 1[illegible] see also Johnson v Reed 9 Mass.78.

Rule V.

When there are mutual agreements of the parties, and both are to be performed at the same time, they are dependent and neither party can recover without performance or a tender of performance on his part.

There are observes Lord Mansfield* covenants which are mutual conditions to be performed at the same time, and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other though it is not certain that either is obliged to do the first act.

The leading case is Sallomel v Briggs **. If either party would sue upon his agreement, the plaintiff for not paying, the one must aver and prove a transfer or a tender, and the other a payment or a tender; for transferring in the first bargain was a condition precedent; and though there be mutual promises, yet if one thing be the consideration of the other, then a performance is necessary to be averred unless a certain day be appointed...

The principle laid down by Holt was recognized by Lord Kenyon in Morton

* Kingston v Preston cited 2 Dougl 689.

** decided 2 Anne 1 Salk 113.

v Lamb *, who said that whether the covenant was independent or not, was to be determined from the good sense of the case. The delivery of the corn, and the payment of the price were held to be concurrent acts to be done at the same time and that therefore each party must aver a performance before he could maintain his action.

Serj. Williams in his note to Pordage v Cole collated the authorities and laid down the rule that "where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenanted to pay A. a sum of money on the same day, neither can maintain an action without shewing performance of, or an offer to perform his part, though it be not certain which of them is obliged to do the first act."**

This was the origin of the rule in the English courts, it remains to show that it was also recognized in the courts of the State of New York.

In 1808 in Green v. Reynolds*** the rule is distinctly recognized and the English cases cited with approval. This was an action upon covenant. By articles of agreement entered into between Green & Reynolds for a consid-

* 7 Term R. 130.
** 1 Saunders 320d.
*** 2 Johnson 207.

eration Green covenanted to execute and deliver to R. on the 1st. of May 1806 a good and suffisient deed of 84 acres of land and R. covenanted to pay to G. $1000 on the 1st of May 1806 and $875 on May 1st 1812." These covenants in this case", says the court," are clearly dependant. The $1000, being in part of the consideration for the deed, and to be paid on the same day the deed was to be delivered, the fair intent, and the good sense of the contract is, that the money is not to be paid, until the deed is ready for delivery."

The rule was yet more clearly enunciated in Jones v Gardner * and Parker v Parmele**. Again in Morris v Slitor *** the court said. "When there are mutual covenants between the parties, the thing to be done by one being the consideration for the thing to be done by the other, and both parties are to perform at the same time the covenants operate as mutual conditions and neither party can maintain an action until he has performed, or offered to perform his part of the agreement. The covenants are independent and neither is obliged to part with his money or property, and trust to a remedy by action against the other. In this instance the case did not fall within the rule as laid down.

* 10 Johns R. 266.
** 20 Johns 130.
*** 1 Denio 59.

The rule had by this time become established in the New York courts. It is well settled, said the court in Williams v Healey*, "that where the covenants between the parties are mutual and both parties are to perform at the same time, the covenants operate as mutual conditions"**.

Rule VI.

"The distinction is very clear" says Lord Mansfield in Boone v Eyre***. where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But when they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent."

The case of Duke of St. Albans v Shore **** decided in 1789 is entirely based upon the foregoing decision of Lord Mansfield and distinctly recognizes the rules, which is once more enumerated among the Rules cited by Serj. Williams in the notes to Pordage v Cole***** The doctrine is thus stated in

* 3 Denio 363.
** see also Levy et al v Burgess 64 N.Y. 394.
*** B.R.East 17 Geo. 3.1 H.B. p.273 n.
**** 1 H.B. p. 270.
***** 1 Saunders p. 320d.

Chanter v Leese*. "The party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated. The rule of Lord Mansfield, according to the original application and as expounded in the decision above mentioned is reasonable. It brings us back to the contract to learn the intention of the parties. Courts are not required to speculate upon the inequality of loss to the parties or to look beyond the agreement to its performance in order to ascertain its character. It is only when the consideration is divisible, and the payments are apportioned by the agreement to the different parts of the consideration, that the covenant becomes independent and a recovery can be had upon the principle and original contract without averring performance or an excuse for non-performance. A covenant which goes only to a part of the consideration is not necessarily independent nor is it conclusive upon this point that the consideration is divisible in its own nature, or that a part of it has been received by the defendant; nor will the circumstance that one or any number of covenants in an agreement are independent render others so."

This is substantially the rule as adopted in the New York courts and

* 4 M.& W. 311.

laid down in the cases of Grant v Johnson* and Pepper v Haight **.

Rule VII.

It is of course within the power of either party to a contract to waive the performance of that portion of the others agreement which he had the right to look upon as a condition precedent before any liability should accrue on his part under the contract. In other words if a party to a contract, entitled to the benefit of a condition precedent upon the performance of which his responsibility is to arise dispenses with it, or by any act of his own prevents the performance, the other party is excused from showing a compliance with its conditions***.

The rule we seek to establish based upon the foregoing principles is this. The law will presume a condition precedent to the right A has to demand the performance of B's condition precedent, upon which the liability of A. was to arise, or in the case of be one mutually dependent B. will be entitled to hold A. to his obligations under the contract without averring performance

* 5 N.Y. 247.
** 20 Barb. 429 p. 440
*** Williams v Bank of U.S. 2 Peters 96 p.102.; Aptix v Pelan 5 Ia. 556.

the law having directly presumed by way of a condition precedent that neither party will do anything to hinder the performance of the contract. And where from the nature of the situation certain circumstances relative thereto must remain unchanged or undisturbed by the action of the parties to the agreement the law will affix such appropriate conduct, namely of leaving matters in such a position that the contract can be acted upon by the other party, as a condition precedent to the right of either party to hold himself discharged from the obligation by a failure in the performance of the condition precedent agreed upon in the terms of the contract or otherwise as explained in the foregoing rules, which failure has been directly caused by his own misconduct.

Rule VIII

The last mentioned rule has already partially introduced us to such conditions precedent which the law by implication must construe as having been intended by the parties to form an essential part of the contract. We touch now upon the construction of conditions precedent which even more clearly arise only by implication of law. No definite rule can be established and we hope to show by instances how such conditions precedent can arise.

For example in the case of endorsement of a promisory note the transaction being primarily one to pass title to negotiable paper nevertheless the right to hold the endorser liable is subject to a condition precedent that the note will be presented in due order and proper notice of nonpayment given the endorser. A condition implied we may say wholly by operation of law.

This rule of implied conditions precedent would seem to open the door to even a greater number of cases. For instance that a party must be capable of making a valid contract as a condition precedent to his right of recovery, or the legality of the contract is a necessary condition precedent to a recovery under the same etc. etc. We do not wish to carry this rule too far but do lay it down broadly in a general way, that in the absence of any agreement to the con-

trary either oral or in writing, which agreement must be legal in its nature, the rights and obligations of each party must be determined subject to such conditions precedent which from the circumstances of the case the law and custom of the land necessarily must be presumed to have implied as forming a part of the contract and the construction of such conditions precedent is in effect but the endeavor to interpret the intention of the parties correctly in obedience to the cardinal rule of construction for all contracts whatsoever.

x x x

Cases Cited.

	Page
Attix v. Pelan, 5. Ia. 336	37
Bank of Montreal v. Recknagel 109 N. Y., 482.	20
Bannerman v. White, 10 C. B. N. S. 60	6 - 17
Barruso v. Madan, 2 Johns, 145.	20
Behn v. Burness, 1, B. & S., 877, 3 B. & S. 751.	2
Boone v. Eyre, B. R. East 17. Geo. 3. 1, H.B. p. 273 n.	35
Callonel v. Briggs, 1. Salk 113.	32
Chanter v. Leese, 4 M & W 311.	36
Christie v. Borelly, 7.C.B.N.S. 560.	18
Cunningham v. Morrell, 10. Johns. 203.	27 - 28
Cutler v. Bower, 11. Q.B. 973.	
Dawson v. Collis. 10. C.B.523.	5
Dixon v. Yates, 5 B. & Ad. 313.	7
Duke of St. Albans v. Shore, 1.H.B. 270,	35
Gilmore v. Supple, 11 Moo P.C.D. 551.	7
Glaholm v. Hays, 2. Man & G. 257.	13
Grant v. Johnson, 5. N.Y. 247.	30 - 37
Green v. Reynolds, 2. Johns 207,	33
Havens v. Bush, 2. Johns 387.	26
Henshaw v. Robbins, 9. Met. 83.	4
Hopkins v. Young, 11. Mass. 302.	24
Hotham v. East India Co. 1. T.R.p. 645.	25
Johnson v. Reed, 9 Mass. 78.	31
Jones v. Barkley, 2. Dougl. 684.	13
Jones v. Gardner, 10 Johns 266.	34
Kingston v. Preston, cited Jones v. Barkley,2 Dougl.p69	23-32
Levy et al v. Burgess, 64 N. Y. 394.	35
Meriden Britannia Co. v. Zingsen,48 N.Y. 247,	25
Morris v. Sliter, 1. Den. 60,	24 -34
Morton v. Lamb 7. T.R. p.125,	22 -33
Northup v. Northup, 6.Cowen.297,	23
Paine v. Brown, 37 N.Y. 233.	31
Parker v. Parmele, 20 Johns 130,	34
Parmelee v. R.R.Co. 6 N.Y. 74.	20
Parson v. Sexton, 4 C.B.899	5
Peeters v. Opie, 2 Saunders 350,	25
Pepper v. Haight, 20 Barb.429.	37
Pordage v. Cole, 1 Saunders 320	26 - 30 - 33 - 35
Poulton v. Lattimore, 9 B.& C. 259.	5
Pym v. Campbell, 6 E.& B. 373,	14
Sears v. Fowler, 2 Johns 272.	27
Selden v. Pringle, 17 Barb. 458.	20 - 29
Sheep v. Blay, 2 B. & Ad. 456.	5
Terry v. Duntze, 2 H.Bl. 392.	26 - 27 - 28
Thorpe v. Thorpe, 12 Mod. 460.	23 - 26 - 27 - 30
Whalton v. Hardisty, 8. E. & B. 302.	6
Williams v. Bank of U.S., 2. Peters 96,	37
Williams v. Healey, 3 Denio, 363.	35

Index.

	Page
Introduction	1
Terminology and Definitions	2
Rule 1	11
Rule 2	23
Rule 3	25
Rule 4	30
Rule 5	32
Rule 6	35
Rule 7	37
Rule 8	39
Authorities Cited	41